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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner,

v.

MAXWELL D. WHITE, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, the Sixth Circuit granted habeas relief based on the habeas petitioner's claim that the state trial court had violated the Constitution by failing to dismiss a potential juror who was impermissibly biased in favor of the death penalty. The question presented is:

> Whether AEDPA prevents a federal court from substituting its own judgment on whether a juror was biased for that of the state trial court's, where the state trial court had the opportunity to evaluate the juror in person, and the transcript provides at least a plausible basis supporting the state trial court's determination that the juror was not biased.

LIST OF PARTIES

The Petitioner is Marc C. Houk, the Warden of the Ohio State Penitentiary, where Ohio's death-sentenced prisoners are held. (Betty Mitchell, Respondent-Appellee below, was the former warden at the Mansfield Correctional Institution, where Ohio's death-sentenced prisoners had previously been held).

The Respondent is Maxwell D. White, Jr., an inmate who had been housed at the Ohio State Penitentiary on death row. (Since the decision below, White was transferred from death row to the Mansfield Correctional Institution, but he will be returned to the Ohio State Penitentiary if his death sentence is reinstated.)

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of the Warden of the Mansfield (Ohio) Correctional Institution, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's Opinion, *White v. Mitchell*, 431 F.3d 517 (6th Cir. 2005), is reproduced at App. 1a–43a. The Sixth Circuit's denial of rehearing en banc is reproduced at App. 44a. The United States District Court for the Northern District of Ohio's Memorandum of Opinion and Order is reproduced at App. 45a–176a. The Ohio Supreme Court's opinion on direct appeal, *State v. White*, 693 N.E.2d 772 (Ohio 1998), is reproduced at App. 177a–199a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals issued its opinion on December 7, 2005. The Sixth Circuit denied the Warden's petition for rehearing with a suggestion for rehearing en banc on April 21, 2006. The Warden timely filed this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code provides in relevant part:

* * *

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

* * *

INTRODUCTION

In a decision that rewrites AEDPA's standards for reviewing juror-bias claims, the Sixth Circuit relied on such a claim to vacate a convicted cop-killer's capital sentence. While the court below recited AEDPA's requirements of deference, it never applied them, resulting in a decision that conflicts with both AEDPA's commands and this Court's precedents regarding how juror-bias claims are evaluated in habeas. Even before AEDPA, this Court had established that state trial court determinations as to juror bias are entitled to special deference, as only the trial court judge is in the position to observe the juror's demeanor. And, if anything, AEDPA has strengthened that deference. Federal habeas courts must accept state court factual findings, such as a finding as to whether a juror is biased, unless the finding is "objectively unreasonable," a standard of review that the

Court has implied is even more deferential than "clear error." *Rice v. Collins*, 126 S. Ct. 969, 974 (2006).

Here, the voir dire transcript would not even support a finding that the state trial judge was "clearly erroneous" in finding the juror to be unbiased, let alone that the judge was objectively unreasonable. During the voir dire, the juror at issue initially voiced some hesitations about her ability to be fair, concerns that any responsible juror might well have when she learns that a case involves the slaying of a police officer and the possibility of the death penalty. But the juror also unequivocally affirmed that she would obey the law and the court's instructions, that she would not allow her personal opinions to override those instructions. She explained that she would "be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed I this particular case," and that she would listen to those factors "with an open mind, unbiased by what [she] feels like [she] might want to do."

The trial court believed the juror's statements. Its decision to accept these sworn statements—statements that the transcript on its face shows that the juror made in good faith—simply cannot rise to the level of "objective unreasonableness" that AEDPA requires before a federal habeas court can ignore state-court credibility determinations. Indeed, permitting the lower court's decision to stand here would allow an unprecedented level of federal court intrusion into state court criminal convictions. In fact, the lower court's analysis on this issue is so deeply flawed, and so sharply contrary to both the statutory language and this Court's mandates, that Ohio respectfully suggests that summary reversal may be warranted. In the alternative, Ohio urges the Court to accept review to prevent this flawed understanding of "unreasonableness" from further permeating habeas jurisprudence.

STATEMENT OF THE CASE

A. Maxwell White shot and killed Ohio State Trooper James Gross during a traffic stop.

In the early morning hours of January 19, 1996, Maxwell White shot and killed Ohio State Trooper James Gross during a routine traffic stop on Interstate 71 in Ohio. Petition Appendix ("App.") 3a.

At the time of the stop, unbeknownst to Gross, White was in an agitated and violent state. White was fleeing his mother's condominium after an altercation with her and his sister. After an argument with his mother, White had tied them up, and then accidentally shot his mother in the foot. He then fled in his car, heading for the interstate. App. 2a.

Trooper Gross was stationed along the highway that evening, and received reports from other drivers that a brown car was driving erratically. He left his outpost and, within minutes, spotted White's brown car. When he called in the license number, he learned that the car was registered to White. He also learned that White did not have driving privileges due to a prior drunk driving conviction. So Trooper Gross pulled White over. App. 3a.

According to passing motorists who later testified at White's trial, Gross walked up to White's car and leaned down to speak with him. At that point, the witnesses testified that they heard a pop and saw a flame. Trooper Gross spun around and fell as he attempted to run back to his vehicle. The witnesses then saw White lean out of the car and fire more shots at the trooper's back. App. 3a.

White fled in his vehicle, and he was caught after a high-speed chase. The gun was found in White's car. Trooper Gross died of bullet to his heart, which had entered Gross' back, just beneath his bullet-proof vest. App. 3a.

B. A state court jury convicted White and recommended the death sentence, which the trial judge imposed.

An Ashland County grand jury indicted White for aggravated murder. The indictment specified two aggravating circumstances, either of which made White eligible for the death penalty: (1) White's victim was a peace officer; and (2) White killed to escape apprehension for a crime. See Ohio Rev. Code §§ 2929.04(A)(3) & 2929.04(A)(6). The indictment further charged White with possession of a weapon while under disability and abduction of his mother. App. 3a–4a.

White invoked his right to a jury trial. Because the indictment included a capital charge, it was necessary to "death qualify" the jury members during voir dire. That is, in selecting the jury before trial, in addition to the typical voir dire, the prosecutor and defense counsel conducted a separate voir dire directed at matters relating to the death penalty.

It was Suzanne Sheppard's answers during that portion of the voir dire that the court below relied on in vacating White's sentence. See App. 31a–43a. (The entirety of Sheppard's penalty phase voir dire is located at App. 200a–13a.) A review of that transcript indeed reflects that Sheppard voiced certain concerns about her participation on the jury. Not surprisingly, given what she had heard in the earlier portion of the voir dire about the heinous nature of the crime, she questioned her ability to be completely open-minded about the penalty if, in fact, the prosecutor proved White shot the officer. For example when she was initially asked whether she "would be able to follow the Court's instructions [about the death penalty]," she responded "I have mixed emotions on that because I feel—I am for the death penalty." App. 203a. She then went on to say that "to be honest, I don't think I would be fair to the Defendant." App. 203a. And further elaborating on that, she stated that:

> **Sheppard**: I feel by listening to everything, I think I could be fair, but I can't sit here and say, yes, I will be fair. I feel I can be after I hear all the facts, but yet again I have doubt. And I don't know if it's strong enough doubt. I just want you to be aware of it.

App. 204a. Similarly, in response to questions from the defense counsel, she indicated that she had "feelings" that she might not be able to be fair to the defendant. App. 210a. And, when asked whether she believed she should serve on the jury, she indicated that she probably should not. App. 210a.

Even in voicing these doubts, however, Sheppard also made it clear that she was not saying that she would automatically vote for death. Rather, she was only in favor of it if "it's proven that it should be given":

> **Prosecutor:** When you're saying to me that you think you could, it sounds to me as though you will not automatically vote for imposition of a death penalty; is that correct?
>
> **Sheppard:** Yes. I guess I am trying to say I am in favor of it as long as it's proven that it should be given.

App. 205a.

Even more importantly, Sheppard completed her examination by offering a number of unequivocal assertions regarding her participation as a juror. First, she testified that she "would obey the law and the [c]ourt's instructions [regarding the death penalty]." App. 212a. Second, when asked if her personal feelings would override those instructions, she unequivocally stated they would not: "I wouldn't let my personal feelings do that, because I would have to live with that the rest of my life." App. 213a. Third, she testified that she would undertake the required balancing

of aggravating factors against mitigating factors before reaching her decision:

> **Defense Counsel:** Then you would be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed in this particular case if you were a juror?
>
> **Sheppard:** Right.

App. 213a. Perhaps most importantly, she expressly affirmed that she would listen to those factors with an open mind:

> **Defense Counsel:** You would listen to those [factors] with an open mind, unbiased by what you feel like you might want to do?
>
> **Sheppard:** Yes.

App. 213a.[1] Based on this testimony, the court overruled the defendant's motion to remove her for cause, and seated her on the jury. App. 213a.

After hearing all of the evidence, the jury found White guilty of aggravated murder.

During the penalty phase, White offered a variety of mitigating evidence, including testimony from family members and co-workers that White had difficulty in school despite above-average intelligence, had trouble with authority figures, was discharged from the Navy, and had battled alcoholism. A psychologist testified that White was dependent on alcohol and marijuana, suffered from depression, lived with a dysfunctional family, and had an abusive father. Finally, White offered a statement apologizing to Trooper Gross's family, accepting responsibility, and asking the jury to spare his life. After

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[1] On page 213a of the Appendix, this question was erroneously transcribed twice. In fact, it was asked once and Sheppard responded "Yes."

hearing his presentation, the jury unanimously recommended a capital sentence. The judge concurred in their recommendation, and imposed a death sentence.

C. White litigated his juror-bias claim on the merits in state court in his direct appeal.

The Ohio Supreme Court affirmed White's conviction and sentence on direct appeal. White raised his juror-bias claim regarding Sheppard as his first proposition of law. The Ohio Supreme canvassed its case law as well as this Court's opinions on the subject and determined that the trial judge did not abuse his discretion in finding that Sheppard was not biased. The Ohio Supreme Court focused on the trial judge's unique position to sort through conflicting responses regarding a juror's thoughts on the difficult issue of imposing the death sentence:

> [W]e recognized that during voir dire in death penalty cases, prospective jurors often struggle with their personal beliefs concerning the death penalty. In these situations, it is the role of the trial judge to sort through the responses of prospective jurors to determine whether these individuals can follow the law.
>
> In this case, the challenged juror expressed repeated concerns over whether she could be fair to the appellant. However, she ultimately acknowledged that she was a fair person and was willing to listen to all the evidence before making a final decision on appellant's guilt. She also stated that she would not let her personal feelings interfere with her ability to be fair to appellant because she would have to live with that the rest of her life. Furthermore, she said she would obey the law and the court's instructions. Since the challenged juror ultimately said that she would follow the law and put aside her personal beliefs,

> we find that the trial court did not abuse its discretion in overruling appellant's challenge for cause.

App. 183a–84a.

D. The federal district court rejected White's juror-bias claim.

After pursuing state post-conviction remedies for other claims, White filed a federal habeas petition advancing twenty-one grounds for relief. This included the juror-bias claim directed at Sheppard, which White used both to attack his conviction and to attack his capital sentence. The district court rejected White's petition. App. 45a. In doing so, the court noted that Sheppard's answers during voir dire were at times ambiguous and contradictory regarding her ability to follow the law in determining the proper sentence. App. 77a–78a. But the district court found itself bound by this Court's consistent instruction that trial judges are uniquely positioned to make the credibility judgment inherent in resolving juror-bias questions in the face of ambiguous and contradictory testimony. App. 78a. The district court found both that there was sufficient evidence from which the trial judge could find no bias and that the Ohio Supreme Court reasonably applied clearly established federal law in upholding the trial judge's decision. App. 79a.

E. The Sixth Circuit reversed the district court and vacated White's sentence.

White appealed on a variety of grounds, including renewing his juror-bias claim as a challenge both to his conviction and his sentence. The Sixth Circuit affirmed the district court with regard to White's conviction, but reversed the trial court decision and granted White habeas relief as to his death sentence. The court based this relief solely on its determination that Juror Sheppard was impermissibly biased in favor of the death penalty.

In rejecting White's juror-bias challenge to his *conviction*, the panel engaged in typical habeas appellate review. It closely considered the state court findings, as well as the district court's determinations. See App. 33a–35a. Based on these, it concluded that "[e]specially in light of the special deference owed to a trial judge's determination of juror impartiality as well as the deferential standard for reviewing factual findings under § 2254, we cannot say that the Ohio Supreme Court's ruling on this issue was unreasonable." App. 35a.

With regard to White's juror-bias challenge to his *sentence*, however, the court took a different tack. With only a passing nod to the state trial court's determination and the Ohio Supreme Court's findings on the juror-bias issue, the panel appeared to independently assess the meaning of juror Sheppard's answers. Based on its own independent review of the transcript, the panel concluded that "[d]espite the deference usually owed to trial judges, we conclude that nothing about Sheppard's demeanor could cure the weighty concerns raised by her voir dire testimony." App. 42a. The panel then added an AEDPA gloss to its otherwise essentially de novo treatment of the juror-bias issue: "Accordingly, we find that the trial judge's failure to excuse Sheppard and the Ohio Supreme Court's finding that the trial court did not abuse its discretion in failing to strike Sheppard were contrary to or an unreasonable application of Supreme Court precedent." App. 42a.

Because the opinion on this issue creates important conflicts both with this Court's precedent, and with law from the other circuits, regarding the appropriate scope of federal court review of state criminal convictions under AEDPA, the Warden now respectfully requests review.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the Court's precedent, AEDPA's plain language, and other federal circuits' views regarding the proper framework for assessing juror-bias claims in habeas. The Court has consistently reminded the lower courts that, because state trial courts are uniquely positioned to assess juror credibility, federal courts may not substitute their judgment for that of the state court on juror-bias issues so long as the record provides at least some plausible support for the state court's conclusion. Although the court below here talked of deference, its decision eschewed the Court's guidance on what such deference means. In the face of a juror's unequivocal assertions that she would follow the court's instructions and that she could and would listen to the evidence with an open mind, the federal court nonetheless rejected the state court's decision that the juror was suitable. That approach simply cannot be squared with the Court's decisions or the previous treatment of such claims in the federal appellate courts, and it will result in unwarranted federal intrusion into state criminal adjudications.

A. Settled precedent mandates "special deference" for state court determinations regarding juror bias.

1. Beginning with *Townsend v. Sain*, 372 U.S. 293 (1963), and proceeding through cases like *Sumner v. Mata*, 449 U.S. 539, 547 (1981), and *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983), this Court has consistently held that federal habeas courts must presume that state court findings of fact are correct. And the Court has also clearly explained what this presumption entails—the presumption "requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair support' in the record." *Id.* at 432 (punctuation omitted). The Court has also emphasized that the

presumption is particularly strong when the state findings involve credibility determinations, as the habeas corpus statute "gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Id.* at 434; see also *Rice v. Collins*, 126 S. Ct. 969, 976 (2006) (habeas petitioner must "demonstrate[] that a reasonable fact finder *must conclude*" the opposite of the trial court's conclusion) (emphasis added).

The Court has repeated this lesson in the context of juror-bias determinations, confirming that a trial judge's bias finding is "plainly one of historical fact" and thus entitled to a presumption of correctness. *Patton v. Yount*, 467 U.S. 1025, 1036, 1038 (1984); see also *Wainwright v. Witt*, 469 U.S. 412, 428 (1985). In fact, such findings are entitled to even greater deference because of the unique credibility determination involved in assessing juror bias. *Patton*, 467 U.S. at 1038 (trial judge's juror-bias determination entitled to "special deference" even on direct appeal); *Rushen v. Spain*, 464 U.S. 114, 121 & n.6 (1983). Indeed, as far back as 1878, the Court noted the severe problems appellate courts face in second-guessing juror-bias determinations:

> [J]urors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case. The affirmative of the issue is upon the challenger.

Reynolds v. United States, 98 U.S. 145, 156–57 (1879). Moreover, this Court has given specific weight to a juror's statement that he or she can be impartial. See *Dennis v. United States*, 339 U.S. 162, 171 (1950) ("One may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter."). Ultimately, on questions of juror bias, "[t]he question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." *Witt*, 469 U.S. at 434.

Congress sought to elevate the level of deference to state-court fact finding when it passed AEDPA in 1996. For post-AEDPA cases, federal courts may not grant the writ unless the state court's factual finding is an "unreasonable determination of facts in light of the evidence presented" during the state court proceedings. 28 U.S.C. § 2254(d)(2). Moreover, "a determination of a factual issue made by a State court shall be presumed to be correct," and a habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

And just this year, the Court confirmed that the level of deference for challenges under AEDPA to juror-bias determinations is high indeed. In *Rice*, a habeas case in which the petitioner had challenged (on *Batson* grounds) a state trial court's decision to exclude a juror, the Court indicated that the AEDPA standards for reviewing state court factual determinations regarding juror bias are at least as deferential as the clear-error analysis the same determinations would receive on direct appeal. 126 S. Ct. at 974 ("On direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error. Under AEDPA, however, a federal habeas court must find the state-

court conclusion an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. . . . State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by clear and convincing evidence.") (citations and punctuation omitted). In short, federal courts are not free to substitute their judgment for that of the state trial court.

2. Until the decision below, decisions from the circuits reflected the Court's clear mandates on this issue. Both before and after AEDPA, in cases where a juror's responses lend support in both directions on bias issues (i.e., some testimony supporting a finding of bias, and some suggesting a lack of bias), federal habeas courts have deferred to the state courts' determination. See, e.g., *Dyer v. Calderon*, 122 F.3d 720, 730 (9th Cir. 1997) (applying pre-AEDPA law); *Gonzales v. Thomas*, 99 F.3d 978, 985 (10th Cir. 1996) (same); *Martini v. Hendricks*, 348 F.3d 360 (3d Cir. 2003) (applying AEDPA); *Williams v. Bagley*, 380 F.3d 932 (6th Cir. 2004) (same); *Sallahdin v. Gibson*, 275 F.3d 1211, 1224 (10th Cir. 2002) (same).

For example, in *Williams*, an earlier Sixth Circuit panel properly deferred to the state trial court's determination that it was unnecessary to exclude two jurors whose voir dire indicated support for the death penalty. The court noted that one of the jurors had given conflicting responses during voir dire. See *Williams*, 380 F.3d at 953; see also *id.* at 954–57 (recounting voir dire testimony, including juror statement that "[i]f there was any remote chance of them being paroled, I would probably go with the death penalty"). But "in response to specific questioning by the trial court and defense counsel, she stated that she could follow the court's instructions and recommend a sentence of life imprisonment with parole eligibility if the aggravating circumstances did not outweigh the mitigating factors." *Id.* at 953–54. That statement, in the face of conflicting responses throughout the

remainder of the voir dire, was enough to mandate deference to the trial court's ultimate conclusion not to exclude the juror. See also *id.* at 960–61 (applying similar reasoning to affirm the trial court's decision on the second challenged juror).

Similarly, in *Martini*, the Third Circuit deferred to the state trial court's decision to exclude a juror where the record reflected juror testimony going both ways. The state trial court had concluded that the juror was opposed to the death penalty to such an extent that it interfered with his ability to follow the law in the case. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968). As the Third Circuit summarized in reviewing a challenge to that decision on habeas, the juror had offered conflicting testimony on that issue:

> Vladyka's responses to certain questions surely create considerable doubt as to whether he could separate his personal beliefs (his opposition to the death penalty) from the task at hand. . . . On the other hand, when asked: 'Would you be able to vote to impose the death penalty?' Vladyka answered, 'Yes, sir.' He also confirmed in at least six other places, with various degrees of conviction, that he would be able to engage in the weighing process and would be able to vote for death if the facts warranted.

Id. at 366. Thus, the court concluded, "[t]he inevitable question is how to interpret the 'I think so's' and the 'I guess so's,' which constitute the bulk of Vladyka's affirmative responses to the effect that he could vote to impose the death penalty." *Id.* at 366–67.

In light of a record containing plausible support for a finding in either direction on the bias issue, the Third Circuit properly left the final determination to the trial court. That is, the court specifically noted that the record provided a sufficient basis for the habeas petitioner to make a "plausible

argument" that the state trial court had erred in excluding the juror. "But," the court went on, "we are constrained by our standard of review. We cannot say by clear and convincing evidence that the state trial judge, who saw Vladyka and doubtless 'sized him up,' was incorrect in his finding." *Id.* at 368.

What these courts uniformly recognize is that where the record could plausibly support a holding in either direction, it is the state trial court, not the federal habeas court, that gets to make the final call.

3. Even habeas courts that do find reversible error in juror-bias determinations are careful to point out that they did so only because the record contained no plausible support for the trial court's determinations.

In *Brown v. Lambert*, 2006 U.S. App. Lexis 14933 (9th Cir. June 19, 2006), for example, the Ninth Circuit granted a writ of habeas corpus based on a petitioner's claim that the state trial court had improperly excluded three jurors who the trial court determined had an anti-death penalty bias.

The court agreed with the habeas petitioner as to one of the three jurors. But, in reaching that result, the court specifically noted that "no degree of deference" would support the trial court's finding, as "nothing whatsoever" in the third juror's voir dire testimony would support the state trial court's conclusion that the juror was so opposed to the death penalty that he could not follow the law:

> The undisputable fact is there is *nothing whatsoever* in juror Z's voir dire that lends *the least support* for the finding—explicit or implicit—that he would not follow his oath. This is a juror who listed himself as pro-death penalty in his juror questionnaire and stated repeatedly under oath that he believes in the death penalty. He did not perhaps show the kind of bloodthirsty

> eagerness for its imposition that the prosecutor may have preferred—juror Z did say he "would have to give [the matter] some thought" and reserved the right to impose the death penalty only when he "was convinced [it] was the appropriate measure"—but there is *nothing in his testimony* that could *remotely support* the view that he would not faithfully follow the court's instructions. No degree of deference, nor allowance for facial expressions and demeanor, can possibly fill in what isn't there: *the least indication* that juror Z could not or would not follow the law.

Id. at *17 n.10 (emphases added). Thus, it was the absence of *any* support in the record that doomed the state trial court's determination, not merely a disagreement as to which part of the juror's statements should be credited.[2] And even under this very deferential analysis, the Ninth Circuit panel's decision drew five votes in favor of rehearing en banc from judges who thought the panel should have afforded even greater deference under AEDPA to the state court's factual findings. See *id.* at *20 (Tallman, J., dissenting from denial of rehearing).

Moreover, again confirming the principle that any plausible support in the record is enough to uphold the state trial court's determination, the Ninth Circuit rejected the

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[2] The Ninth Circuit also noted that the trial court ultimately had never made a finding on the proper *Witherspoon* question for juror Z, and thus there was no factual finding to which to defer. Rather than finding that juror Z would be unable to follow instructions, the state court instead found simply that juror Z's statement that he would impose the death penalty where the defendant "would reviolate if released" was an incorrect statement of the law, and thus proper grounds for a for-cause exclusion. This is an improper analysis under *Witherspoon*, and thus, as the Ninth Circuit held, was "directly contrary to Supreme Court precedent," *Id.* at * [illegible] (citing 28 U.S.C. 2254(d)(1)).

petitioner's claims as to the two other jurors. As to them, it found that at least a few lines in the record indicated a possible unwillingness on those jurors' part to follow the law, thereby triggering deference to the state court's decision to exclude them.

Similarly, in other cases, where federal courts have reversed state-court determinations regarding juror bias it is because the record lacks *any* support for the state trial court's bias determination. See *Stevens v. Horn*, 2006 U.S. App. Lexis 17043, at *23–24 (3d. Cir. July 6, 2006) ("In the absence of *any* evidence in the record to support the state courts' finding, it must be true that Stevens has established, by the requisite clear and convincing evidence, that Hartling was [improperly] removed for cause on a 'broader basis than inability to follow the law or abide by [her] oath [as a juror].'"); *Wolfe v. Brigano*, 232 F.3d 499, 503 (6th Cir. 2000) (reversing failure to exclude two jurors when "[n]either of these jurors stated unequivocally that they could set aside their relationships with the victim's parents and decide the case fairly;" reversing failure to exclude two additional jurors "[i]n the absence of an affirmative and believable statement that these jurors could set aside their opinions and decide the case on the evidence and in accordance with the law"); *Gall v. Parker*, 231 F.3d 265, 331 (6th Cir. 2000) (reversing, under *Witherspoon*, the exclusion of a juror who "not once stated that his beliefs would deter him from serving as an impartial juror").

Requiring such deference only makes sense. Voir dire, transcripts, after all, will often suffer from some internal conflict. Jurors are typically lay people, meaning that legal jargon may leave them confused. The voir dire may be their first interaction with the judicial system, causing stress or leading the potential jurors to "over-think" their responses. And, as was the case here, lawyers often add to the confusion, posing long questions in garbled syntax. See App. 206a. (court responding to juror's confusion about question

by noting that "I think you [defense counsel] need to rephrase that. I have difficulty with the question too."). In light of that reality, a rule that would permit federal courts to disregard a state trial court's judgment on a juror-bias issue, so long as the federal court could find some portion of the voir dire transcript that casts doubt on the decision, would be an open invitation for federal courts to micromanage the state criminal jury selection process. That is hardly the result Congress intended in AEDPA.

4. Indeed, even outside the habeas context, when federal appellate courts directly review federal trial court determinations on issues of juror bias, they do so under a clear-error standard of review. The Eight Circuit, in *United States v. Tucker*, 243 F.3d 499 (8th Cir. 2001), treated *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), as its "pole star" for reviewing the trial court's findings in a concealed-juror-bias claim under *McDonough Power Equip. v. Greenwood*, 464 U.S. 548 (1984):

> Under *Anderson*, review for clear error requires not just deference to the fact finder's views, but a very specific level of deference:
>
> > If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.
>
> *Id.* [*Anderson*] at 573–74. We may reject the fact finder's choice between conflicting evidence only where there is something wrong with the choice.

> See *id.* at 574–75. Furthermore, when findings are based on determinations regarding the credibility of witnesses, the level of deference is even higher than the standard already described. *Id.* at 575. "When a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Id.*

Tucker, 243 F.3d at 506 (quoting and citing *Anderson*). See also *United States v. Elias*, 269 F.3d 1003, 1021 (9th Cir. 2001) (upholding trial court's juror-bias determination after clear-error review); *United States v. Viezca*, 265 F.3d 593, 601 (7th Cir. 2001) (same). And, as noted above, the standard under AEDPA is, if anything, even *more deferential* than the clear-error standard on direct review. See *Rice*, 126 S. Ct. at 974.

Taken together, these cases uniformly confirm the straightforward proposition that, so long as the record provides at least plausible support for the state trial court's juror-bias determination, federal habeas courts may not second-guess state trial judges. As more fully described below, however, the decision below squarely conflicts with this settled jurisprudence, and threatens to dramatically alter the fundamental nature of AEDPA review of juror-bias claims.

B. The decision here conflicts with settled law in failing to defer as AEDPA directs to the state court determination regarding juror bias.

In this case, the court below spoke of providing deference, but a review of its actual judgment confirms that the definition of "deference" the court employed is vastly different from the one this Court, and AEDPA's plain

language, mandate. Even a quick review of the voir dire transcript confirms that the state trial court's determination that Juror Sheppard was unbiased is, at the least, "fairly supported by the record," *Witt*, 469 U.S. at 433, and one of "two permissible views of the evidence," *Anderson*, 470 U.S. at 574. Despite Sheppard's statements that she favored the death penalty and her stated concerns about participating on the jury, in the end she repeatedly and unequivocally affirmed that she would indeed set aside her personal beliefs, consider the evidence, and follow the court's instructions on the law. See above at 6–7. The state trial court elected to credit those statements. The federal court's decision to second-guess that determination upsets settled understandings of "deference," creating an untenable conflict in habeas jurisprudence.

1. Under *Morgan v. Illinois*, 504 U.S. 719, 729 (1992), a juror cannot serve in a capital case if she cannot "in good faith [ ] consider the evidence of aggravating and mitigating circumstances as the instructions require." To find "fair support in the record" for the trial court's determination that Juror Sheppard passes muster under *Morgan*, one need only look to her responses to both the prosecutor and the defense counsel near the end of her voir dire. There she affirms:

- that she will "obey the law and the [c]ourt's instructions," App. 212a;
- that she will not allow her personal feelings to override the judges instructions, App. 213a;
- that she would "be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed in this particular case," App. 213a; and
- that she "would listen to [that evidence] with an open mind, unbiased by what [she] feel[s] like [she] might want to do," App. 213a.

To be sure, the transcript also contains passages that *could be* used to support a finding of bias. But the same could have been said about the conflicting voir dire testimony in cases such *Williams* and *Martini*. See *Williams*, 380 F.3d at 955 (affirming trial court that allowed juror despite pro-death penalty statements including "[i]f there was any remote chance of them being paroled, I would probably go with the death penalty"); *Martini*, 348 F.3d at 366 (affirming trial court that excused juror despite at least six statements indicating willingness to impose death despite the juror's scruples). There the courts saw the conflicting testimony as requiring the federal court to accept the state court's determination, while here the court used it as a basis for overturning the state court's decision.

By doing so, the court below abandoned settled understandings of "deference," in favor of some broader power to oversee juror-bias determinations. Even though it repeatedly acknowledged the "deference usually owed to trial judges" in this situation, the court ultimately substituted its own credibility determination for the trial court's. Instead of searching for support in the record to affirm the trial court's determination, the Sixth Circuit focused on its *own* "grave" and "weighty" concerns about Sheppard's voir dire testimony. App. 41a, 42a. Ultimately, the Sixth Circuit concluded that "Sheppard was simply unbelievable as an impartial juror." App. 42a. But as established above, reversing a trial court's credibility determination is not the province of a federal habeas court, unless the determination "lack[s] even fair support in the record" *Rushen*, 464 U.S. at 121 n.6 (brackets omitted), or unless the determination is not one of two "permissible views of the evidence," *Anderson*, 470 U.S. at 574. Sheppard's repeated, express statements of impartiality establish that the trial court's determination was a permissible one, and the Sixth Circuit overstepped its role when it concluded otherwise.

The court's emphasis on particular statements in Sheppard's voir dire highlights the problems with its analytical approach. The court read a certain passage from the voir dire—where Sheppard said she would "like to be a part of that," App. 212a—as suggesting that Sheppard was "eager[] to impose the death penalty in this particular case," App. 35a, or that she "relished taking part in the imposition of the death penalty in this particular case." App. 41a. But that passage could just as easily be read to suggest something entirely different. Reading the passage as a whole, Sheppard seems to be saying that she had initially hoped to avoid serving on the jury, but that she had come to recognize during the voir dire that it was a civic duty, and not one that she should abandon lightly. See App. 212a (Sheppard notes that "[w]hen I walked in here today, it was—I thought it would be an easy out just to say I think he's guilty and that's it," but now believes she has "a duty" to "find the real truth" and be part of the judicial process). The point of the Court's jurisprudence on juror-bias issues is that it is the state trial court, not the federal habeas court, that should be selecting between competing interpretations. The lower court's willingness to simply substitute its own judgment for the state court's creates a direct conflict with that jurisprudence.

In the final analysis, this case is nearly identical to the situation presented in *Rice*. There, the Ninth Circuit had overturned a state court finding that the prosecutor had offered a credible race-neutral reason for exercising a peremptory challenge. This Court unanimously reversed, finding that the Ninth Circuit substituted its own view of the record on the credibility issue for that of the trial judge's.

Here, just as in *Rice*, the circuit court relied on, at best, a "set of debatable inferences" from the record below to support its conclusion on the credibility issue. 126 S. Ct. at 976. And, just as in *Rice*, while the court below may have shown that reasonable minds *could* have gone the other way

on the bias question, that "does not suffice to supersede the trial court's credibility determination." *Id.*

In short, to obtain relief, as the Court noted in *Rice*, the habeas petitioner must show that "a reasonable factfinder *must conclude*" that the state court determination was wrong. *id.* at 975 (emphasis added). While the record here might *allow* a conclusion of bias, it certainly does not *compel* that conclusion, and thus, just as in *Rice*, a federal court cannot step in and "supersede" the state court's credibility determination. *Id.*

Finally, Ohio stresses that the decision below is not merely an erroneous application of settled law to the facts of this case. Rather, the decision reflects an entirely new understanding of deference, one that allows a federal court to ignore a state court's holding, even where that holding has fair support in the record. Of course, in the context of habeas, rules regarding deference are a vital component of protecting the States' sovereign right to control their criminal adjudication processes. Thus, the decision here, if allowed to stand, will have impact far beyond the boundaries of this case.

The understanding of deference reflected in the decision below so clearly conflicts with the Court's precedent that Ohio respectfully suggests that summary reversal may be appropriate. At the very least, the lower court's adoption of an unprecedented and unwarranted framework for assessing juror-bias claims calls for immediate review and correction.

CONCLUSION

For all of the above reasons, Ohio urges the Court to grant the State's petition and reverse the Sixth Circuit's decision.

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